

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:NR:DEN:POSTF-128258-02

WRDavis

date: **17 JUN 2002**

to: Team Manager, International, Denver (LMSB:RFPH:I)
Attn: Susan Pientka, International Examiner

from: Area Counsel
(Natural Resources:Houston)

subject:

What is the Proper Method to Allow the Partners in a TEFRA Partnership an Adjustment in the Partnership's Favor?

EIN: [REDACTED] Tax Year [REDACTED]

Address: c/o [REDACTED]

ATTN: [REDACTED]

By memorandum dated May 23, 2002, we provided advice to clarify whether the procedural steps required in a TEFRA partnership audit are necessary to allow the partner of a partnership an adjustment in the partner's favor. We wish to supplement this advice, pursuant to its post-review by National Office. This memorandum should not be cited as precedent.

DISCLOSURE STATEMENT

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse affect on privileges, such as the attorney-client privilege. If disclosure becomes necessary, please contact this office for our views.

SUPPLEMENTAL ADVICE

1. In addition to the authority to grant refunds cited in response to issue 2 of the prior memorandum (seeking a citation to authority for our views on how to allow the additional loss), we direct you to I.R.C. § 6230(d)(5). That section allows the Service to grant a refund even where the partner has not filed a claim for refund. Thus, if there is an overpayment in this situation, the Service has the authority to grant a refund.

2. Finally, some concern was expressed concerning acceptance of informal claims. Please note that the Service

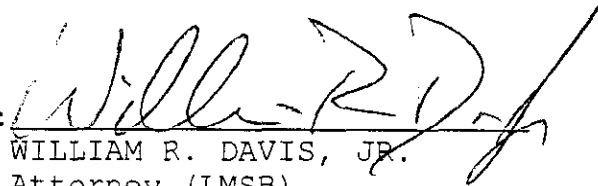
generally will not accept informal claims for refund in lieu of an administrative adjustment request (AAR). The use of Form 8082 (as an AAR) would normally ensure that the requirements of section 6227 have been met in full. However, the failure to use Form 8082 is not fatal if all of the information that the Service requires is otherwise provided with the AAR in a usable form or fashion. See Temp. Treas. Reg. § 301.6227(c)-1T. This would not only include the information showing the effect on distributive shares required by section 6227(c)(3), but also a detailed explanation substantiating the validity of the treatment requested.

Because an AAR is the TEFRA equivalent of a claim for refund, the failure to substantiate the treatment requested by an AAR should have a substantial and adverse impact on the tax matters partner or other partner that institutes the judicial proceeding in a district court or the Claims Court. Thus, without a detailed explanation supporting the treatment of partnership items requested in an AAR, the Service cannot determine whether an informal claim should be accepted.

Please contact the undersigned at (303) 844-2214, ext. 259, if you have any further questions.


BERNARD B. NELSON
Area Counsel
(Natural Resources:Houston)

By:


WILLIAM R. DAVIS, JR.
Attorney (LMSB)

copy to:

Dick Annett,

 Audit Team Coordinator

Janice Mueller,
TEFRA Coordinator

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:NR:DEN:POSTF-128258-02
WRDavis

date: 23 MAY 2002

to: Team Manager, International, Denver (LMSB:RFPH:I)
Attn: Susan Pientka, International Examiner

from: Area Counsel
(Natural Resources:Houston)

subject:

What is the Proper Method to Allow the Partners in a TEFRA Partnership an Adjustment in the Partnership's Favor?

EIN: Tax Year

Address: c/o

ATTN:

We provide the following to clarify whether the procedural steps required in a TEFRA partnership audit are necessary to allow the partner of a partnership an adjustment in the partner's favor. This memorandum should not be cited as precedent.

Please note that, as nondocketed significant advice, this advice is subject to a 10-day post-review by Chief Counsel National Office. Once this review has been completed, I will contact you to advise of its acceptance upon review, or of any modifications to the proposed response.

DISCLOSURE STATEMENT

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ISSUES

1. In what way may an audit team allow the taxpayer an additional loss that arises from an increase in the taxpayer's distributive share of a partnership loss where the partnership is subject to the unified partnership audit procedures under I.R.C. § 6221 et seq. ("TEFRA audit procedures")?

2. What is the authority for the position taken in response to issue 1., above?

3. To the extent that a computational adjustment is allowable, what effect, if any, will such adjustment have on the Service's ability to examine the partnership in a TEFRA proceeding at a later date?

CONCLUSIONS

1. and 2. If the taxpayer has filed a Request for Administrative Adjustment, the Service may process that request in the same manner as a non-TEFRA refund claim. Additionally, section 6227(d)(1) of the TEFRA audit provisions permits the Service to issue a refund in the absence of a claim filed by the taxpayer.

3. Where the period of limitations under section 6229 for assessing any tax attributable to a partnership item has not expired, the Service's prior issuance of a refund pursuant to a computational adjustment has no effect on the ability of the Service to open a TEFRA partnership audit at a later date, or to make any adjustments to the partnership return.

FACTS

A consolidated corporate income tax return was filed by [REDACTED] Inc. (EIN [REDACTED]), for itself and its affiliated subsidiaries as the common parent, for its taxable year ended December 31, [REDACTED], in accordance with I.R.C. § 1501 et seq. and the regulations thereunder. During that year, [REDACTED], was a wholly-owned subsidiary of [REDACTED], and a member of the [REDACTED] consolidated group.

[REDACTED] held a [REDACTED] percent interest in the [REDACTED] Partnership. That partnership conducted a [REDACTED] business in the United Kingdom. All other partners were entities from the United Kingdom, and were not subject to U.S. income tax.

As of the time that [REDACTED] prepared its consolidated return for [REDACTED], it had not yet received a Schedule K-1 from the

¹ Subsequent to the close of the tax year at issue, [REDACTED] Inc., was renamed [REDACTED] Inc., in a transaction that qualified as a reorganization under 368(a)(1)(F). Later, [REDACTED] was merged into a subsidiary of [REDACTED] in a forward triangular merger. Our opinion is unaffected by these events.

partnership. [REDACTED] estimated the partnership loss for that year, claimed that loss on its consolidated return for [REDACTED] and filed Form 8082 with it. Form 8082 disclosed that [REDACTED] was taking an inconsistent position from the then-as-yet unfiled [REDACTED] partnership return by including the partnership loss.

During the audit of [REDACTED]'s [REDACTED] tax year, the taxpayer filed an informal claim ("Hold for Audit") with the Service's audit team showing an additional loss of \$ [REDACTED] from the partnership, based on the Schedule K-1 that was eventually issued to [REDACTED] for its partnership interest in [REDACTED]. Thereafter, the audit team determined that [REDACTED] was entitled to the additional partnership loss shown on the informal claim.

The [REDACTED] audit team has established statute controls on [REDACTED] ([REDACTED] is the sole U.S. partner), but has not, and does not currently plan to open an audit of the partnership, unless the processing of the informal claim requires it to do so.

ANALYSIS

1. & 2. Treas. Reg. § 301.6222(b)-1T sets out the general rule that the Service usually makes adjustments to partnership items (1) pursuant to a partnership-level proceeding, or (2) after notifying the partner under section 6231(b)(1)(A) that all partnership items arising from that partnership will be treated as nonpartnership items. However, these are not the exclusive ways to do so.

If an informal claim meets the requirements of a request for administrative adjustment, section 6227(d)(1) permits the Service to "process the request in the same manner as a claim for credit or refund with respect to items which are not partnership items." In a similar vein, the Tax Court has rejected the notion that the Service is required to conduct a TEFRA partnership audit to accept the partnership return prior to determining a deficiency with regard to an affected item. See Jenkins v. Commissioner, 102 T.C. 550, 556 (1994); Roberts v. Commissioner, 94 T.C. 853, 860-861 (1990). No partnership proceeding is needed to process a claim for credit or refund for nonpartnership items; none should be needed to process a request for administrative adjustment as a claim for credit or refund.

Temp. Treas. Reg. § 301.6227(c)-1T, in effect for partnership taxable years beginning prior to October 4, 2001²,

² T.D. 8965, 2001-43 I.R.B. 344, replaced Temp. Treas. Reg. (continued...)

specifies the requirements for such a request. That regulation required that administrative adjustment requests filed on behalf of a partner:

(a) Be filed in duplicate, the original copy filed with the partner's amended income tax return (on which the partner computes the amount by which the partner's tax liability should be adjusted if the request is granted) and the other copy filed with the service center where the partnership return is filed;

(b) Identify the partner and the partnership by name, address, and taxpayer identification number;

(c) Specify the partnership taxable year to which the administrative adjustment request applies;

(d) Relate only to partnership items; and

(e) Relate only to one partnership and one partnership taxable year.

Temp. Treas. Reg. § 301.6227(c)-1T.

Our review assumes that the "Hold for Audit" was not filed as an administrative adjustment request by the tax matters partner on behalf of the partnership. Unless [REDACTED] was a limited partner during the tax year at issue and thereafter, it was the only partner that was a "United States person," as defined under section 7701(a)(30). The prohibition against designating a person who is not a "United States person" as the tax matters partner, set forth in Temp. Treas. Reg. § 301.6231(a)(7)-1T(b)(2), would have made [REDACTED] the tax matters partner by default. However, our understanding of the facts is that [REDACTED]'s "Hold for Audit" was not intended, nor did it meet, the requirements for a substituted return treatment, as contemplated by section 6227(c)(1) or Temp. Treas. Reg. § 301.6227(b)-1T(a). If our understanding is incorrect, please contact us in that regard.

In Phillips v. Commissioner, 106 T.C. 176 (1996), the Tax Court set out the requirements for a partner to change treatment of a partnership item from a partnership that is subject to the TEFRA audit procedures:

²(...continued)

§ 301.6227(c)-1T with Treas. Reg. § 301.6227(d)-1, applicable to partnership taxable years beginning on or after October 4, 2001.

Section 6227 provides that in order to change the treatment of a partnership item on his return the partner must file a request for administrative adjustment (RAA). The RAA is filed on Form 8082, Notice of Inconsistent Treatment or Amended Return, together with the partner's amended Federal income tax return. The RAA may be filed no later than (i) 3 years after the later of the filing date or due date of the partnership return for the taxable year to which the request relates, and (ii) the date on which an FPAA is mailed to the tax matters partner with respect to that taxable year. If a request to change the treatment of a partnership item conforming to the requirements of section 6227 is received by the Secretary, he is authorized to approve it or take certain specified actions necessary for resolution of the issue through a unified partnership proceeding or through regular deficiency or refund procedures. The statute does not authorize the Secretary to consider a nonconforming request.

Phillips, 106 T.C. at 180-181 (1996) (citations omitted); but see Wall v. United States, 96-1 U.S.T.C. ¶ 50,307 (9th Cir. 1996) (finding that a nonconforming RAA substantially complied with the regulatory requirements when it provided all necessary information).

If the request does not appear to comply completely with the requirements of section 6227(c)(3) and the regulation promulgated thereunder, the Service could argue that the taxpayer has not made a valid request for adjustment. However, if the material filed in the present matter contained information needed to examine and process the requested change, we believe the wiser course is to determine that the "Hold for Audit" substantially complied with the regulatory requirements. We note that your review of the "Hold for Audit" issues satisfied you that the additional amount of [REDACTED]'s distributive share of partnership loss from [REDACTED] was proper.

3. Generally, the Service must complete a partnership audit within the period of limitations set forth for making assessments that is set forth in section 6229. We understand your question to be limited to the effect that the granting of a refund to the taxpayer has on the Service's ability to perform a partnership audit at a later time, assuming no other prohibitions to an audit.

We again note the language of section 6227(d) and (d)(1):

If any partner files a request for an administrative adjustment (other than a request described in subsection (b)), the Secretary may process the request in the same

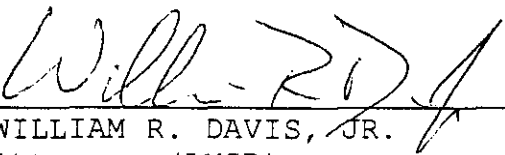
manner as a claim ~~for~~ credit or refund with respect to items which are not partnership items.

We view this as meaning that the Service's processing of a "Hold for Audit" that substantially complies with the requirements of Temp. Treas. Reg. § 301.6227(c)-1T is not to be characterized as any type of partnership proceeding under the TEFRA audit procedures.

We note that section 6223(f) prohibits the Service from sending any more than one notice of final partnership administrative adjustment for any partnership taxable year with respect to a partner, in the absence of fraud, malfeasance, or misrepresentation of a material fact. We note no other statutory prohibitions to a partnership audit, or any case law setting forth any judicial doctrines that prevent the Service from examining a partnership return after an administrative adjustment request has been processed as a refund claim. For these reasons, we conclude that the granting of a refund in this manner has no impact on our ability to conduct a later partnership audit.

Please contact the undersigned at (303) 844-2214, ext. 259, if you have any further questions.

BERNARD B. NELSON
Area Counsel
(Natural Resources:Houston)

By: 
WILLIAM R. DAVIS, JR.
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